No. 04-765

In the

Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of Alabama

BRIEF OF THE STATE OF ALABAMA IN OPPOSITION TO THE PETITION

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CAPITAL CASE

QUESTION PRESENTED

Whether this Court should grant a writ of certiorari to determine whether Fourteenth Amendment of the United States Constitution entitles Maples to a state writ of mandamus allowing him an out-of-time appeal from the denial of his state postconviction petition?

PARTIES

The caption contains the names of all parties in the courts below.

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OPINIONS BELOW

The opinion of the Supreme Court of Alabama denying Maples's petition for a writ of mandamus is unreported and reproduced in petitioner's brief at Appendix A. The published opinion of the Alabama Court of Criminal Appeals denying Maples's petition for a writ of mandamus is found at *Ex parte Maples*, No. CR-03-0021, 2004 WL 102861 (Ala. Crim. App. Jan. 23, 2004), and is reproduced in petitioner's brief at Appendix B.

STATEMENT OF JURISDICTION

The State of Alabama submits that this Court does not have jurisdiction under 28 U.S.C. § 1257 to review the Supreme Court of Alabama's denial of Maples's petition for a writ of mandamus. Subsection 1257(a) states in pertinent part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ...where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of ... the United States." 28 U.S.C. § 1257(a). The Supreme Court of Alabama reviewed *de novo* Maples's petition for a writ of mandamus under Rule 21(e)(1) of the Alabama Rules of Appellate Procedure, in which Maples requested an out-of-time appeal; the state supreme court determined that Maples was not entitled to that extraordinary state remedy. There is no right to a writ of mandamus under Rule 21 of the Alabama Rules of Appellate Procedure "specially set up or claimed under the Constitution or the treaties or statutes of ... the United States." *See id.* Because there are no federal constitutional considerations incident to the Supreme Court of Alabama's application of a state procedural rule that dictates when a state writ of mandamus may issue, this Court does not have jurisdiction.

STATEMENT OF THE CASE

Cory Maples was convicted of two counts of capital murder and sentenced to death for the intentional murders of Stacy Alan Terry and Barry Dewayne Robinson, II. *Maples v. State*, 758 So. 2d 1, 14 (Ala. Crim. App. 1999). On March 26, 1999, the Alabama Court of Criminal Appeals affirmed Maples's conviction and sentence of death. *Id.* After the Alabama Court of Criminal Appeals denied Maples's application for rehearing, the Supreme Court of Alabama affirmed his conviction and sentence. *Ex parte Maples*, 758 So. 2d 81 (Ala. 1999).

On August 1, 2001, Maples filed a petition for postconviction review in the trial court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure collaterally attacking his conviction and death sentence. *Ex parte Maples*, 885 So. 2d 845, 846 (Ala. Crim. App. 2004). Clara Ingen-Housz and Jaasi Munanka of the law firm of Sullivan & Cromwell in New York City were admitted *pro hac vice* to represent Maples in his Rule 32 proceeding. Although Ingen-Housz and Munanka were the only Sullivan & Cromwell attorneys admitted *pro hac vice* to represent Maples in Alabama, a number of other attorneys from that firm assisted in Maples's representation. (Maples's petition for Writ of Mandamus to Supreme Court of Alabama exhibit A) Along with the New York lawyers, John G. Butler, an Alabama lawyer, represented Maples as local counsel. *Ex parte Maples*, 885 So. 2d at 846.

On May 22, 2003, the trial court denied Maples's petition. *Id.* The following day, the court clerk mailed copies of the order denying the petition to Maples's attorneys Ingen-Housz, Munanka, and Butler at the addresses they provided to the court. *Id.* at 846-47. Maples's Alabama attorney received the notice that the petition had been denied. The notices sent to Maples's New York attorneys, both of whom had failed to inform

the trial court or the court clerk that they had left the firm and were no longer at the addresses that they provided, were returned to the court clerk; one had "return to sender - left firm" hand written on the envelope. *Id.* Maples's local attorney took no action and made no effort to contact Maples's New York attorneys at Sullivan & Cromwell regarding the trial court's order. (Maples's petition for Writ of Mandamus to Supreme Court of Alabama exhibit B) As a result, Maples failed to file a notice of appeal within the time limit required by the Alabama Rules of Appellate Procedure.

Thereafter, three associates at Sullivan & Cromwell filed a motion in the trial court requesting the court reissue its order disposing of Maples's petition, thus allowing them to then file a timely notice of appeal. *Ex parte Maples*, 885 So. 2d at 846. That motion was denied.[1] *Id.* Then, on October 8, 2003, pursuant to Rule 21 of the Alabama Rules of Appellate Procedure, Maples filed a petition for a writ of mandamus in the Alabama Court of Criminal Appeals requesting that court to order the trial court to allow an out-of-time appeal of the denial of his Rule 32 petition. The petition alleged that procedural due process required that court to grant Maples a writ of mandamus allowing him an out-of-time appeal of the denial of his state postconviction petition. On January 23, 2004, the Alabama Court of Criminal Appeals denied Maples's petition for a writ of mandamus. *Id.* at 850.

Maples did not petition the Supreme Court of Alabama for certiorari from the Court of Criminal Appeals. Instead, on February 6, 2004, Maples submitted substantially the same petition for a writ of mandamus to

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[1] In *Marshall v. State*, the Supreme Court of Alabama held "that a writ of mandamus is the only method by which to obtain an out-of-time appeal from the denial of a Rule 32 petition. ..." *Ex parte Maples*, 885 So. 2d at 846; *Marshall v. State*, 884 So. 2d 900, 905 (Ala. 2003).

the Supreme Court of Alabama for *de novo* review pursuant to Rule 21 (e) of the Alabama Rules of Appellate Procedure. On September 4, 2004, the Supreme Court of Alabama denied Maples's petition for a writ of mandamus without opinion stating, "It is ordered that the petition for writ of mandamus in this cause is denied." (Petitioner's Brief Appendix A)

So, again, to be clear, Maples did not seek a writ of certiorari in the Supreme Court of Alabama under Rule 39 of the Alabama Rules of Appellate Procedure, as he alleges to this Court. (Petitioner's Brief at 7) Instead, he resubmitted his petition for a writ of mandamus to the Supreme Court of Alabama under Rule 21 of the Alabama Rules of Appellate Procedure. Under Rule 21(e), the Supreme Court of Alabama treats the mandamus request as an entirely new proceeding, reviews the petition *de novo*, and denied the petition in a one-sentence order.

REASONS FOR DENYING THE PETITION

Even assuming that jurisdiction exists, there are three principal reasons this Court should deny Maples's petition for writ of certiorari.

A. Maples's Petition for Certiorari Does Not Fall Within Any of the Grounds for Certiorari Enumerated in Rule 10 of the Rules of the Supreme Court of the United States and Fails to Satisfy 14 of the Rules of the Supreme Court of the United States.

Maples's petition does not fall within any of the expressed reasons for granting certiorari contained in Rule 10 of the Rules of the Supreme Court of the United States. Although Maples alleges that "[t]his Court should now grant certiorari to resolve a settled conflict between state courts of last resort over the meaning of an important federal constitutional right," (Petitioner's Brief at 2), which appears to invoke Rule 10(b), this allegation is without merit. Maples cannot definitively point to any conflict between the Supreme Court of Alabama's denial of his petition for a writ of mandamus pursuant to Rule 21 of the Alabama Rules of Appellate Procedure and the Florida Supreme Court's holding in *Williams v. State*, 777 So. 2d 947 (Fla. 2001).

Under Rule 21 of the Alabama Rules of Appellate Procedure, a petitioner must establish: "(1) a clear legal right to the [relief] sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court." *Ex parte Walker*, 675 So. 2d 408, 410 (Ala. 1996)(quoting *Ex parte Alfad, Inc.*, 586 So. 2d 889, 891 (Ala. 1991)). The Supreme Court of Alabama, reviewing Maples's petition *de novo*, denied his petition without opinion in a one-sentence order. In the face of that void, Maples cannot show which of the above elements the court found to be

lacking. Maples also cannot show that the Supreme Court of Alabama did not deny his petition for failure to follow the procedures for obtaining such a writ contained in Rule 21 of the Alabama Rules of Appellate Procedure. Therefore, Maples cannot show that the Supreme Court of Alabama held that a petitioner who fails to file a timely appeal of the denial of his postconviction petition, solely through the error of his counsel, is not entitled to a belated appeal in conflict with *Williams*. 777 So. 2d at 950-51.

Even setting aside the fact that the Supreme Court of Alabama denied Maples's request without elaboration, it remains the fact that the Alabama and Florida Courts were deciding procedural issues under separate state procedural rules regarding state law remedies. In *Williams*, the Florida Supreme Court applied Rule 3.850 of the Florida Rules of Criminal Procedure, which authorized postconviction proceedings and in its holding amended that rule. 777 So. 2d at 950. The Supreme Court of Alabama applied Rule 21 of the Alabama Rules of Appellate Procedure to determine whether Maples followed the state procedure for obtaining a writ of mandamus and was entitled to such a writ. Maples cannot show that the Supreme Court of Alabama's decision denying him an Alabama extraordinary writ conflicted with the Florida Supreme Court's determination that Williams was entitled to an untimely appeal of his Florida state law postcoviction proceeding. The Florida Supreme Court – it goes without saying – was not applying Rule 21 of the Alabama Rules of Appellate Procedure and made no determination regarding the procedure that a petitioner must follow in order to obtain a writ of mandamus or a determination of the showing that a petitioner must establish under Rule 21 in order to obtain such writ. Hence, Maples cannot show that there is a conflict between the Supreme Court of Alabama's denial of his petition for a writ of mandamus and the Florida Supreme Court's holding in *Williams*. 777 So. 2d at 950.

Additionally, Maples's petition fails to meet the requirements for a petition for a writ of certiorari specified in Rule 14 of the Rules of the Supreme Court of the United States. Rule 14 (1)(g)(i) requires a petition for a writ of certiorari to contain the method and manner in which the federal questions were raised in the state courts "and the way in which they were passed on by those courts. ..." Rule 14, *Rules of the Supreme Court of the United States.* The Supreme Court of Alabama, upon *de novo* review under Rule 21 of the Alabama Rules of Appellate Procedure, summarily denied Maples's petition for a writ of mandamus in a one-sentence order. It is impossible to determine how – or even whether – the Supreme Court of Alabama passed on any federal question when it denied Maples's petition. As noted, the Supreme Court of Alabama could very well have simply determined that Maples failed to follow the procedure for obtaining a writ of mandamus. Thus, Maples has failed to show how the Supreme Court of Alabama passed on any federal question.

Maples's petition does not fall within any of the enumerated reasons for granting a petition for a writ of certiorari contained in Rule 10 and fails to meet the requirements of Rule 14. Accordingly, certiorari should be denied.

B. This Court Should Deny Certiorari Because Maples's Claim is Without Merit.

The question Maples raises – "whether the due process clauses of the 5th and 14th Amendments to the United States Constitution require the states to permit an untimely appeal from the denial of state post-conviction relief where that appeal is untimely solely through an error of counsel..." – was for all intents and purposes foreclosed by this Court in *Coleman v. Thompson*. *See* 501 U.S. 722, 752-54 (1991).

In *Coleman*, the petitioner filed his notice of appeal of the denial of his state habeas corpus petition three days after the time limit set by the Virginia Supreme Court

had lapsed. *Id.* at 727. The Virginia Supreme Court upheld the dismissal the petitioner's appeal, as untimely. *Id.* at 727-28. Petitioner then filed a federal habeas corpus petition, raising the same issues that were in his state habeas corpus petition. *Id.* at 728. Petitioner alleged that the procedural default was the result of his attorney's error; thus, he said, it should be excused. *Id.*

This Court disagreed and held that because there is no constitutionally protected right to counsel in a postconviction proceeding, counsel is the petitioner's agent, and the petitioner must "bear the risk of attorney error" such as ignorance or inadvertence. *Id.* at 753. Thus, "where the state has no responsibility to ensure that the petitioner was represented by competent counsel ... it is the petitioner who must bear the burden of a failure to follow state procedural rules [due to attorney error]." *Id.* at 754.

This case is analogous to *Coleman*. Maples was not constitutionally entitled to counsel in his Rule 32 proceeding; therefore, under settled law, he must "bear the burden" of his attorneys' inadvertent error. *See id* at 754; *see also Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987)(states not required to supply an attorney in a collateral postconviction proceeding); *Murray v. Giarratano*, 492 U.S. 1, 6-12 (1989)(applying *Finley* to collateral postconviction proceedings where the petitioner in under a sentence of death); *Hamm v. State*, CR-99-0654, 2002 WL 126990, at *5 (Ala. Crim. App. Feb. 1, 2002)("there is no right to counsel in a postconviction proceeding. ..."). Bearing the burden of his attorneys' errors, Maples was not entitled to an out-of-time appeal necessitated by such an error. Maples cannot avoid the *Coleman* line of cases simply by repackaging his claim in procedural due process wrapping. The result is the same; procedural due process does not require that Maples be allowed an out-of-time appeal of the denial of his postconviction petition. *See Wainwright v. Torna*, 455 U.S. 586, 588 n.4 (1982) ("Respondent was not denied due process of law by the fact that counsel deprived him of his

right to petition the Florida Supreme Court for review. Such deprivation – even if implicating a due process interest – was caused by his counsel, and not by the state. Certainly, the actions of the Florida Supreme Court in dismissing an application for review that was not filed timely did not deprive respondent of due process of law."); *Arzanipour v. I.N.S.*, 866 F.2d 743, 746 (5th Cir. 1989)(the dismissal of an appeal of an order to deport petitioner as untimely filed is not a violation of petitioner's right to due process); *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343-44 (1st Cir. 2004)(dismissing petition seeking review of deportation order as untimely); *United States v. Torres*, 372 F.3d 1159, 1161-63 (10th Cir. 2004)(an attorney's misreading of an unambiguous rule is not "excusable neglect" excusing an untimely appeal); *United States v. Salinas*, 365 F.3d 582, 586, 590 (7th Cir. 2004)(dismissing appeal as untimely).

At the end of the day, Maples's petition is an attempt to use procedural due process to circumvent this Court's holdings in *Pennsylvania v. Finley*, 481 U.S. 551, and *Murray v. Giarratano*, 492 U.S. 1, that there is no right to counsel in collateral postconviction proceedings. If this Court were to hold that a petitioner is entitled, as a matter of procedural due process, to an out-of-time appeal of the denial of his postconviction petition when he failed to timely file notice of appeal through error of postconviction counsel, it would, in effect, be holding that a petitioner has a right to effective assistance of counsel in those proceedings. Following such a holding, any petitioner whose postconviction petition was dismissed as insufficiently plead or for failure to follow any other procedural requirement could presumably allege that the dismissal was due to his attorney's error or incompetence; therefore, he would argue, under procedural due process, that he was entitled to file a second petition – again, in effect, granting a right (through the backdoor) to effective assistance of counsel in postconviction proceedings.

Because this Court has foreclosed Maples's claim, and he has offered no reasons for overruling *Coleman, Finley*, or *Murray*, certiorari should be denied..

C. This Court Should Not Grant Certiorari to Review a State Court's Application of a State Remedy.

This Court should not grant certiorari to review the Supreme Court of Alabama's application of Rule 21 of the Alabama Rules of Appellate Procedure, a state law remedy. Maples cannot definitively point to any federal question decided by the Supreme Court of Alabama when it summarily denied his petition for an Alabama writ of mandamus. As noted above, the Supreme Court of Alabama could have denied Maples's petition for a writ of mandamus for a number of reasons that do not involve a federal question; thus, any review by this Court would be a review of the propriety of a state court's application of a state law.

For instance, under Rule 21 of the Alabama Rules of Appellate Procedure, the time for filing a petition for writ of mandamus is a reasonable time, presumptively forty-two days. *See* Ala. R. App. P. 21(a); *Ex parte Morris*, 782 So. 2d 249, 251 n.2 (Ala. 2000)(citing *Ex parte Butts*, 775 So. 2d 173, 176 (Ala. 2000)). If a petitioner fails of file his petition for a writ of mandamus within the forty-two days, then petitioner must show good cause for the appellate court to consider the petition by filing a statement with the petition. *Id.* An untimely petition for a writ of mandamus must contain a statement showing good cause, as required under Rule 21 of the Alabama Rules of Appellate Procedure, or it will be denied. *Ex parte Sharp*, CR-1020781, 2003 WL 23025608, at *3 (Ala. Dec. 30, 2003)("Because the State's petition for the writ of prohibition was not timely filed and did not include the statement of good cause for the appellate court to consider the petition as required by Rule 21, Ala. R. App. P., we conclude that the Court of Criminal Appeals should not have considered the State's petition for the writ of

prohibition."); *Ex parte Davis*, 834 So. 2d 830, 832-33 (Ala. Crim. App. 2002)(same). Maples's Rule 32 petition was denied on May 22, 2003. Maples's time to file a notice of appeal lapsed on July 5, 2003. Maples did not file his petition for writ of mandamus with the Alabama Court of Criminal Appeals until October 8, 2003. The Supreme Court of Alabama could have determined that Maples's petition was filed fifty-five days after the reasonable time to file a petition for a writ of mandamus had lapsed. Maples did not file in his petition a statement in support of the untimely filing as required by Rule 21 of the Alabama Rules of Appellate Procedure. Therefore, the Supreme Court of Alabama could have denied Maples petition for failure to abide by Rule 21 – failing to file a mandatory statement showing good cause for his failure to timely file his petition for writ of mandamus.

Additionally, the Supreme Court of Alabama could have *sua sponte* determined that there was not good cause for the appellate court of consider Maples's late petition for writ of mandamus. This Court has held that attorney error is not cause in a federal habeas corpus proceedings. *Coleman*, 501 U.S. at 754 ("Attorney ignorance or inadvertence is not 'cause'" ... in a federal habeas corpus setting.); *see also Bagwell v. Dretke*, 372 F.3d 748, 756 (5th 2004)(same); *Rouse v. Lee*, 339 F.3d 238, 250 (4th 2003)(same); *Ritchie v. Eberhart*, 11 F.3d 587, 592 (6th 1993). It follows that the Supreme Court of Alabama could have determined that attorney error does not constitute good cause for the untimely filing of a petition for an Alabama writ of mandamus. Clearly, the denial of a petition for a writ of mandamus for failure to abide by the state procedure for petitioning for that writ does not involve a federal question.

Furthermore, there are no substantial federal questions involved in a state court's refusal to allow an appeal of the denial of a state postconviction petition when that refusal is based on a state law time bar. In *Coleman v. Thompson*, this Court recognized that the dismissal of an untimely appeal of the denial of a state

postconviction petition on state procedural grounds does not raise any federal questions. 501 U.S. 722, 740 (1991). The *Coleman* Court stated:

> Coleman does not argue, *nor could he*, that it "fairly appears" that the Virginia Supreme Court's decision rested primarily on federal law or was interwoven with such law. The Virginia Supreme Court stated plainly that it was granting the Commonwealth's motion to dismiss the petition ... based solely on Coleman's failure to meet the Supreme Court's time requirements. There is no mention of federal law in the Virginia Supreme Court's three-sentence dismissal order. It "fairly appears" to rest primarily on state law.

Id. at 740 (emphasis added). Because the Virginia Supreme Court dismissed Coleman's appeal as untimely under Virginia law, there was no federal question involved in that dismissal. *Id.*[2]

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[2] Although there is a presumption that a state decision rests on federal law unless the state court expressly states otherwise, that presumption does not apply in this case. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). The *Long* Court stated that:

> [W]hen ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [this Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. In order for the *Long* presumption to apply, however, the state court's decision must "appear to rest primarily on federal law or to be interwoven with federal law." *Coleman v. Thompson*, 501 U.S. 722, 736 (1991). Because the denial of Maples's petition for a writ of mandamus does not appear to rest on federal law, there is no presumption that federal law was the basis of the decision.

Although not in a federal habeas corpus posture as *Coleman*, Maples's case is analogous. *See id.* Maples failed to file a notice of appeal of the denial of his Rule 32 petition within the time limit set under Alabama law. He then filed a petition for a writ of mandamus requesting that the Supreme Court of Alabama order the trial court to allow him to file an untimely notice of appeal, which was denied. Maples's inability to appeal the denial of his Rule 32 petition is due to his failure to abide by Alabama's procedural time limits. Thus, the Supreme Court of Alabama's denial of Maples's petition, enforcing Alabama's statutory time limit, did not "rest primarily on federal law [and was not] interwoven with such law." *See Id.*

Because Maples cannot show that the Supreme Court of Alabama's decided any federal question when it summarily denied his petition for a writ of mandamus and because there is no substantial federal question involved in a state court's denial of an untimely appeal, a grant of certiorari review by this Court would be to determine the propriety of a state court's application of a state law. A determination of the propriety of a state court's application of a state law is not worthy of this Court's certiorari review.

CONCLUSION

For the foregoing reasons, this Court should deny Maples's petition for certiorari.

Respectfully submitted,

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